PRE-TRIAL DISCOVERY OF IMPEACHMENT EVIDENCE: A NEED TO REEXAMINE ARIZONA'S NEW RULE

JON L. KYL

THE PROBLEM DEFINED

In many personal injury cases the plaintiff alleges injuries which affect him for some time after the accident. If the defendant has the means, and if some aspect of the case suggests that the plaintiff has misstated the extent of his injuries, the defendant may want to compare the plaintiff's claim with what he can observe and record for himself by surveillance movies taken of the plaintiff after the accident. If the movies illustrate a material variance between the plaintiff's claim and the actual extent of his injuries the defendant will probably use the movies as evidence in an attempt either to disprove the plaintiff's case for damages or to impeach the veracity of the plaintiff should he testify at the trial. To avoid surprise and enable him to neutralize any adverse evidence, the plaintiff might, by a Rule 33 interrogatory, request that the defendant disclose the content of any surveillance evidence in his possession. The defendant may well object to such an interrogatory on the ground that if he uses the evidence to impeach the plaintiff, it is immune from pre-trial discovery, since it is not relevant to any substantive issue, and since its value might be lost if the plaintiff knows of it. Should the defendant be required to disclose the evidence?

This comment will analyze the rules of pre-trial discovery of impeachment evidence in an effort to crystallize the extent to which such evidence is and should be discoverable. The necessity of such an analysis is acute in Arizona because of our supreme court's recent decision establishing a rule for discovery of this evidence.[1]

TWO CONFLICTING THEORIES OF DISCOVERY

Impeachment evidence is designed to discredit a witness by showing the trier of fact why it should not believe his testimony.[2] The

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[1] Zimmerman v. Superior Court, 402 P.2d 212 (Ariz. 1965).

[2] III WIGMORE, EVIDENCE § 874, at 362 (3d ed. 1940); MCCORMICK, EVIDENCE § 33, at 62 (1954); UDALL, ARIZONA LAW OF EVIDENCE § 61, at 79 (1960).

evidence may show the witness' bias, attack his character or his capacity to observe, recall or relate, or disclose a prior inconsistent statement or a specific contradiction of fact.[3] Substantive evidence, on the other hand, is used to persuade the trier of fact of the truth of the proposition on which the determination of the tribunal is asked.[4] Some evidence has both substantive and impeachment qualities. As the introductory example illustrates, a surveillance movie may relate both to the substantive issue of damages and to the veracity of the witness.

Courts faced with the question of whether to require disclosure of this mixed evidence have divided into two camps. Most federal courts[5] have followed a theory which generally disfavors discovery of evidence with impeaching qualities. Though the procedure varies, it always allows the defendant to decide whether he will use mixed evidence for impeachment or for substantive proof. If he elects to use the evidence to impeach, and the plaintiff has submitted an interrogatory demanding its disclosure, the court must then examine the evidence to determine whether it in fact has impeachment qualities. If it does, the court will not require that it be disclosed to the plaintiff.

The other camp, led perhaps more by writers[6] than courts,[7] views impeachment evidence just as discoverable as substantive evidence. Under this theory, unless the evidence is irrelevant or privileged (the Rule 26 limitations) both its possession and content must be disclosed in compliance with an interrogatory served under Rule 33 of the Rules of Civil Procedure.

ARIZONA'S NEW RULE: THE ZIMMERMAN DECISISON

In *Zimmerman v. Superior Court*,[8] the Arizona Supreme Court was

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[3] III WIGMORE, EVIDENCE § 920-1046, at 444-740 (3d ed. 1940); MCCORMICK, EVIDENCE § 33-50, at 62-111 (1954); UDALL, ARIZONA LAW OF EVIDENCE § 61-69, at 79-112 (1960).

[4] I WIGMORE, EVIDENCE § 1, at 3 (3d ed. 1940); MCCORMICK, EVIDENCE § 39, at 73 (1954).

[5] See, *e.g.*, Leach v. Chesapeake & Ohio Ry., 35 F.R.D. 9 (W.D. Mich. 1954); Bogatay v. Montour Ry., 177 F. Supp. 269 (W.D. Pa. 1959); Coyne v. Monongahela Connecting Ry., 24 F.R.D. 357 (W.D. Pa. 1959); Stone v. Marine Transport Lines, Inc., 23 F.R.D. 222 (D. Md. 1959). For related cases dealing primarily with the work product privilege, often claimed in conjunction with the impeachment exception, see State v. McMillan, 330 Mo. 386, 351 S.W.2d 22 (1961) (evidence not discoverable primarily because it was attorney's work product); Atchison, Topeka & Santa Fe Ry. v. Superior Court, 208 Cal. App. 2d 73, 25 Cal. Rptr. 54 (1962); and Suezaki v. Superior Court, 23 Cal. Rptr. 368, 373 P.2d 432 (1962) (where the evidence was held discoverable). California's rule varies from the "Federal rue" in that the matter of discovery is left to the discretion of the court in light of the circumstances of each case. See Annot., 95 A.L.R.2d 1084 (1964).

[6] See, *e.g.*, Wright, *Discovery*, 35 F.R.D. 39, 41 (1963); Chandler, *Discovery and Pre-Trial Procedure in Federal Courts*, 12 OKLA. L. REV. 321 (1959).

[7] Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961) appears to be the only case adhering to this view.

[8] 402 P.2d 212 (1965).

faced with questions similar to those posed in the introductory example: Where the plaintiff claimed to be permanently disabled as a result of injuries sustained in an automobile accident, (1) was the defendant required to disclose whether he had conducted any surveillance or investigation of the plaintiff subsequent to the accident, and if so, (2) was he required to disclose the content of such surveillance. In a split decision,[9] the supreme court quashed the defendant's alternative writ of prohibition against the superior court, thereby forcing the defendant to answer the interrogatory.

The court first held that any evidence which existed was not immune from discovery on the basis that it was "work product" of the attorney.[10] Though the only question presented to the court was whether the existence of the evidence had to be admitted under a Rule 33 interrogatory, it found that the evidence was discoverable under *any* of the discovery rules. To the argument that the impeachment value of the evidence would be lost as a result of its disclosure, since the plaintiff could then change her story to circumvent the evidence, the court first rationalized that the defendant could not be harmed by the disclosure if the witness conformed her testimony to the truth (illustrated by the movies). The court then asserted that since the defendant's impeachment evidence might also be untrue, the court would not infer that the plaintiff's first statement of her injuries was untrue.[11]

Finally, the court reasoned that Uniform Rule VI, concerning the production of exhibits at pre-trial, does not allow the offering of impeachment evidence at the trial if undisclosed at pre-trial, in spite of its language that "Counsel shall not offer any other exhibits at the trial, *except when offered for impeachment purposes* . . . ."[12] (Emphasis added.) The court reasoned that Rule 26(b), which defines the scope of discovery as including "any matter, not privileged, which is relevant to the subject matter involved in the pending action," is a limitation on Uniform Rule VI. Since the court felt that any surveillance evidence which existed would have qualities of both substantive and impeachment evidence, it would be relevant, and hence, discoverable.

In a forceful dissent,[13] Vice Chief Justice Struckmeyer first criticized the court for, in effect, retracting its recent amendment to Uniform Rule VI, which he suggested had been intended by the court to preclude a party from discovering whether his opponent had any im-

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[9] Udall, J., was joined by Lockwood, C.J., Bernstein, and McFarland, J.J. Struckmeyer, V.C.J., dissented.

[10] Zimmerman v. Superior Court, 402 P.2d 212, 214-15 (1965).

[11] *Id.* at 216-17.

[12] *Supra* note 9.

[13] Zimmerman v. Superior Court, 402 P.2d 212, 218 (1965).

peachment evidence. Next, he felt compelled to recognize what he considered to be the reality that there are plaintiffs who, unconsciously or deliberately, commit prejury in exaggeration of the extent of their injuries and that impeaching them is often the only way to expose the perjury and protect the defendant.[14] He also pointed out that surveillance evidence should not be discoverable because, unlike most evidence, surveillance movies have nothing to do with the merits of the action, having come into existence after the accident, and are concerned with facts better known to the plaintiff than to the defendant. Finally, he dismissed as hypothetical fancy the claim that the impeachment evidence is likely to be perjured.[15]

ANALYSIS OF ZIMMERMAN: HAS ARIZONA GONE TOO FAR?

Zimmerman has apparently placed Arizona among the minority jurisdictions, forcing disclosure of mixed or impeachment evidence when requested under any discovery rule. In attempting to define a total rule of pre-trial discovery and failing to restrict its decision to the Rule 33 situation presented, the court laid down dicta of dubious validity, which could drastically alter the use of our discovery rules. Superficially, the court's logic that if the evidence is discoverable at one stage of the proceeding "it would be absurd" for it not to be discoverable throughout the proceeding, is correct. But analytically, is there not an important distinction between discovering evidence from anyone (Rule 26) and a party (Rule 34) or an adverse party (Rule 33); or between disclosure (Rule 33) and production (Rule 34); or between a rule which requires good cause (Rule 34) and one which does not (Rule 33)? For example, under the court's ruling, if the evidence is discoverable under Rule 33, with no good cause requirement, it must also be produced under Rule 34, requiring good cause, even if no good cause could be shown. As Justice Struckmeyer pointed out, if the court adheres to this view, it has automatically found good cause to exist in every case.[16]

The court's view, of course, would subvert the requirements of Rule 34,[17] especially since good cause has often been found lacking where the demanding party already knew the facts he was seeking from the other party, such as the extent of his own injuries[18] (which was the case in *Zimmerman*). Even under the two cases quoted by the court

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[14] *Id.* at 219.
[15] *Id.* n.2.
[16] *Id.* at 220.
[17] The requirement of Rule 34 was stated by Taine, *Discovery of Trial Preparation in the Federal Courts*, 50 COLUM. L. REV. 1026, 1063 (1950). "'Good Cause' is equivalent to necessity." "The extreme position has been that relevancy is the only test, but it would seem that adoption of this criterion would emasculate the requirement of good cause entirely . . ." *Ibid.* at 1064.
[18] *Ibid.* at 1055, n.179.

for the proposition that impeachment evidence can be discoverable,[19] the portions quoted state that good cause must be shown for production under Rule 34. Because of the requirement of good cause in the rule, and in the rules stated in the quotations included in the court's own opinion, it would seem that the opinion *cannot* go as far as apparently was intended, i.e., to promulgate a rule covering all of the discovery process. Hence, it should not be considered precedent for anything but a Rule 33 interrogatory, which is what the court was faced with in the first place.

To force the disclosure of the evidence, the court first had to deal with the defendant's contention that the impeachment value of the evidence would be lost if it were disclosed to the plaintiff since the plaintiff could then alter her story to circumvent the evidence. The entire answer of the court to this contention was the quotation of portions of two cases. The first[20] asserted that if the prior evidence (a statement there, rather than a surveillance movie) were the true version of the occurrence the *defendant could not be harmed* if the plaintiff's testimony at the trial was consistent with the statement. This conclusion indicates that the court, in that case, was concerned not with impeachmen evidence, but with substantive evidence. Clearly, if the plaintiff could conform her testimony to the prior inconsistent statement (or movie), *it would obviously harm the defendant had he intended to use the evidence to impeach* because the alteration of her testimony could neutralize what would otherwise have been an inconsistency which the defendant would have used to impeach her. The case cited should not have been used as authority in a case such as *Zimmerman*, where the defendant apparently intended to use the evidence solely for impeachment purposes.[21]

The second case relied upon by our court was *Boldt v. Sanders*,[22] the leading case for the minority discovery rule. In a case where mixed evidence is intended to be used only to impeach, and not to prove any substantive issue, *Boldt* has only limited value as authority. Stating one of the reasons why the evidence was discoverable, the *Boldt* court said: ". . . in this case the information which plaintiff seeks bears on the

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[19] State Farm Insurance Co. v. Roberts, 97 Ariz. 169, 398 P.2d 671 (1965) and Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958), cited in *Zimmerman* at 216.

[20] Watts v. Superior Court, 87 Ariz. 1, 347 P.2d 565 (1959), cited in *Zimmerman* at 216.

[21] By urging the rule of Bogatay v. Montour Ry., 177 F. Supp. 269 (W.D. Pa. 1959), on the court, the defendant (petitioner) inferentially agreed to use its evidence for impeachment only, since under the *Bogatay* rule, if the defendant wishes not to disclose the evidence he must elect to use it solely for impeachment. See Petitioner's Reply Memorandum to the court, p. 5.

[22] Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961), cited in *Zimmerman* at 216.

fundamental issue of the nature and extent of the injuries which Mrs. Boldt sustained in this accident. *She is entitled to know what evidence defendant will produce on this issue* in view of his denial that her condition is serious or is attributable to this accident."[23] (Emphasis added.) Applying this statement to *Zimmerman* (it was quoted in the opinion),[24] the plaintiff is entitled to know nothing, because the defendant did not intend to produce his evidence "on this issue," i.e., "the nature and extent of the injuries" of the plaintiff. Since the reason for forcing disclosure in *Boldt* did not exist in *Zimmerman* the *Boldt* reasoning should not have been used to support the requirement of disclosure.

The second major problem with which the court was faced was the defendant's contention that the recent amendment to Uniform Rule VI, precluding the offering at the trial of any evidence not offered at the pre-trial conference "except when offered for impeachment purposes," prevented the court from forcing the disclosure of any surveillance movies. The intent of the amendment exempting impeachment evidence can be seen from a brief examination of its history. In the spring of 1964 the supreme court indicated its interest in amending the Uniform Rules of Practice, and the State Bar Committee on the Rules for Practice and Procedure recommended certain changes.[25] A proposed draft circulated in October did not exempt impeachment evidence from disclosure. Some members of the bar indicated their disapproval.[26] As a result, on December 31, 1964, after lengthy discussion of the question, the court amended Rule VI(b) and (f) by exempting impeachment evidence from the disclosure requirement. The amendment went into effect March 8, 1965, and the opinion of the court in *Zimmerman* was handed down just over two months later.

It is difficult to understand why the court exempted impeachment evidence from discovery and then held that its amendment was subject to the Rule 26 caveat that evidence is discoverable unless privileged or irrelevant. The court's construction of the rule rendered the amendment absolutely meaningless. If impeachment evidence were relevant before the amendment it is just as discoverable now as it was before; if it were irrelevant before the amendment, it is just as immune from discovery now as it was before. The rule did not change the discoverable status of impeachment evidence one iota. Justice Struckmeyer exposed the court's complete about face in the repudiation of its amendment by stating:

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[23] *Id.* at 228.
[24] Zimmerman v. Superior Court, 402 P.2d 212, 217 (1965).
[25] Zimmerman v. Superior Court, 402 P.2d 212, 218 (1965) (Struckmeyer, V.C.J. dissenting).
[26] *Supra* note 11.

> I do not think this Court should fluctuate willy-nilly, blowing hot and cold from moment to moment and day to day. Consistency has some virtue. The court having charted a course, it should be adhered to until a reasonably satisfactory trial has demonstrated a need for change.[27]

Under one of the leading cases for the majority rule, *Bogatay v. Montour Ry.*,[28] a local rule almost identical to Uniform Rule VI was considered along with an interrogatory similar to the one in *Zimmerman*. The case held that the defendant need not answer the interrogatory, because the rule protects impeachment evidence from discovery. Our court disagreed with that case because of its interpretation of Rule 26(b) of the Uniform Rules of Civil Procedure, which allows discovery of unprivileged matter which is relevant to the subject matter of the suit. But the reasoning of our court is not entirely clear. The court stated:

> counsel need not . . . disclose exhibits which he is going to use *solely* for impeachment purposes which would not be within the scope of discovery as defined by Rule 26(b). This would include demonstrative evidence which does not meet the relevancy requirements of Rule 26(b) and is therefore not discoverable but which would be admissible in evidence *solely* for impeachment purposes. . . .[29] (Emphasis added.)

Mixed evidence might be admitteed into evidence *solely* for impeachment purposes. Thus, the rule of *Zimmerman* might be limited to substantive evidence or mixed evidence not offered solely to impeach, for if evidence is offered solely to impeach (whether mixed or not), it cannot as a practical matter be relevant for any other purpose, and hence, would not be discoverable. Though this is the logical implication of the courts language, in view of the fact that the court seemed to go out of its way to rule on all aspects of this discovery problem, and because it held the evidence discoverable in spite of its apparent limited

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[27] Zimmerman v. Superior Court, 402 P.2d 212, 219 (1965) (Struckmeyer, V.C.J. dissenting).

[28] 177 F. Supp. 269 (W.D. Pa. 1959). In *Bogatay* the court was faced with the situation in which the injured plaintiff had been asked on cross-examination whether he could carry on his work. Judge McLlvaine commented on this situation:

> The plaintiff, despite the liberality of the Federal Rules of Civil Procedure, still has the burden of proof. The least he should be required to do is to state whether he can carry on work. He should state this honestly and not make such answer depend on whether defendant has or has not observed his activities. 177 F. Supp. 269, 270 (W.D. Pa. 1959).

Judge McLlvaine served on the Committee on Civil Procedure of the Judicial Conference of the United States until his death. "One of the conferences ordained by the Judicial Conference of the United States to acquaint newly appointed district judges with problems in the district court" was the Dearborn Conference, discussed in Leach v. Chesapeake & Ohio Ry., 35 F.R.D. 9 (W.D. Mich. 1964), and "it was apparent that the consensus of the panel" of district judges was that the rule ennunciated by Judge McLlvaine was favored. (35 F.R.D. 9, at 11).

[29] Zimmerman v. Superior Court, 402 P.2d 212, 217 (1965).

purpose (to impeach), the Arizona court might consider its decision to apply to *all* evidence with substantive qualities, whether it is intended to be admitted on a substantive issue or not. Whether the *Zimmerman* decision went too far in this respect will depend on whether, when faced with strictly impeachment evidence or mixed evidence intended for impeachment use only, the court will force disclosure. If so, the decision would clearly be incorrect, for even *Boldt*, the leading minority case, did not go that far.

The major criticism of both *Boldt* and *Zimmerman* is that they are based on the false premise that the plaintiff is seeking relevant facts from the defendant. Both cases held evidence discoverable because ". . . the information which plaintiff seeks bears on the fundamental issue of the nature and extent of the [plaintiff's] injuries . . . ."[30] But that was clearly not what the plaintiff in either case sought, for they were certainly aware of the extent of their own injuries. Rather, it is obvious that each was seeking to know whether the defendant possessed any knowledge of the facts bearing on the fundamental issue. Though evidence concerning the extent of injuries is relevant under Rule 26, and therefore discoverable, evidence regarding the *possession* of certain knowledge by the defendant is not relevant to any substantive issue, and therefore should not be discoverable. In short, the Rule 26 caveat that relevant matters are discoverable is inapplicable to matters such as what the defendant knows of the plaintiff, or what his strategy is, because such matters are just not relevant to any substantive issue of the case. "No legitimate purpose of discovery is served by inquiries which merely pry into an adversary's preparation for trial; and the discovery procedure has not been formulated for the benefit of a litigant who is already in possession of all of the facts."[31]

Arizona has clearly gone too far if our rule is to be that irrelevant facts, such as the defendant's possession of knowledge about the plaintiff, are discoverable, for Rule 26 limits the scope of discoverable matter to that which is *relevant* and not privileged. It is doubtful that the court intended to make such a rule; but because the court's reasoning seems to result in that rule, clarification is needed.

THE EFFECTS OF ZIMMERMAN

If, as it appears, *Zimmerman* lays down a rule requiring disclosure of the possession of evidence offered solely to impeach, its effects will not be applauded. Such a rule would remove one of the few remaining obstacles to virtual unlimited and often unwarranted recoveries for

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[30] Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225, 228 (1965).

[31] McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D. N.Y. 1939).

many plaintiffs. It would further stimulate the recognized trend toward higher recoveries for plaintiffs. This conclusion is difficult to deny if a few basic facts are recognized.

The first fact to be recognized was stated in Justice Struckmeyer's dissent in *Zimmerman*. "Every lawyer is aware that there are plaintiffs who commit deliberate perjury in exaggeration of the extent of their injuries. There are also a great many more who unconsciously magnify their disabilities."[32] That surveillance movies are valuable in exposing this perjury is illustrated by many cases,[33] and confirmed by writers in the field.[34]

A second fact necessary to recognize is that much of the value of impeachment evidence is lost if it must be disclosed to the opposition prior to the trial. Neither *Zimmerman* nor the cases it relies on deny that an unscrupulous plaintiff can alter his testimony to conform to impeachment evidence discovered. And if the defendant, in reply to the interrogatory, answers that he has not undertaken any surveillance, the plaintiff has a free hand in describing his injuries. Thus, whether obtained or not, surveillance evidence loses its value if the fact of surveillance and the results therefrom must be disclosed to the plaintiff. From this, it follows that even if the defendant is only required to state whether he has conducted any investigation, he will be prejudiced whether he has or not. The effect of the decision on both the defendant and the dishonest plaintiff is clear.

Another effect is certain; settlements are far less likely to occur when the dishonest plaintiff knows either that the defendant is not aware of the exact extent of his injuries or that if he is, he cannot surprise the plaintiff with that knowledge. Parties bargain in stalemates or when the cost of continuing the fight would be too great for both. There is little meaningful bargaining by one in a superior position of strength, and that would often be the position of a plaintiff armed with complete knowledge of the defendant's strategy. It has been said that settlement is often achieved when the plaintiff is confronted with sur-

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[32] *Supra* note 9.

[33] See, *e.g.*, Wren v. St. Louis Public Service Co., 333 S.W.2d 92 (Mo. 1960), where surveillance movies used for impeachment exposed as false the plaintiff's perjured claim that he could only use his hand and arm in a certain manner. For other cases illustrating exposure by surveillance films of perjury by plaintiff, parents and physicians, see Lambert v. Wolf's Inc., 137 So. 2d 522 (La. 1961); Barham v. Nowell, 243 Miss. 441, 138 So. 2d 493 (1962); Jordan v. New Amsterdam Casualty Co., 353 S.W.2d 256 (Tex. Civ. App. 1962), *rev'd on other grounds*, 359 S.W.2d 864 (1962).

[34] See, *e.g.*, NOTE, 47 MINN. L. REV. 255, 293 (1962-63). See also letter of Robert O. Lesher, former justice of the Arizona Supreme Court, n.1 at 218. Cross examination generally is said by McCormick to be the "major safeguard to truth," because "probably most trial lawyers and most students in the field of evidence would agree that the oath and penalties of perjury, though of substantial value, are not the principle safeguard of the trustworthiness of testimony," MCCORMICK, EVIDENCE § 39, at 74 (1954).

veillance movies taken by the defendant. Adhering to the rule which protects the evidence will not change this any, since the defendant can always voluntarily disclose the evidence. If, in the defendant's opinion, the evidence so clearly shows that the plaintiff was not telling the truth that the plaintiff cannot adapt his allegations to fit the evidence, the defendant may well want to disclose it to stimulate a settlement. But if the evidence is such that the plaintiff could, with time and reflection, adapt his story, the defendant should be allowed the alternative of withholding the evidence until the trial. And if the evidence shows that the plaintiff is telling the truth the defendant can still settle the case before the trial.

Another alleged effect of the decision will be to achieve the ultimate purpose of discovery, getting all of the facts before the trier of fact. Actually, lesser, rather than greater discovery could result from the rule which purports to guarantee greater discovery. In allowing the plaintiff to discover that the defendant has done no investigating, the court could conceivably be concealing the truth, since the dishonest plaintiff could, if there were no other evidence bearing on the issue, have a free hand in the description of his injuries. If he deliberately or unconsciously misstated his disability, all of the facts would *not* have gotten before the trier of fact. If, on the other hand, the fact of investigation and its results were not discoverable, rather than a failure of proof, the result would probably be the presentation of all of the facts. For fear of being exposed, the plaintiff would have to tell the truth.

As another factor contributing to the rise in the number of amounts of plaintiffs recoveries, the *Zimmerman* decision must surely also be a contributing factor to rising insurance rates. Perhaps as a means of averting that, Arizona will eventually have to resort to a system of damages based upon recovery irrespective of negligence, such as now exists in the field of workmen's compensation. Some states have already considered this possibility for automobile accident victims, but none has found a plan sufficiently desirable to adopt.[35]

ARIZONA SHOULD REDEFINE ITS DISCOVERY RULE

Because of the dubious and uncertain foundation upon which *Zimmerman* stands, Arizona's rule on pre-trial discovery of impeachment evidence should be redefined at the earliest opportunity. The rule announced in *Leach v. Chesapeake & Ohio Ry.*,[36] and *Bogatay v. Montour Ry.*,[37] is not entirely inconsistent with the holding of *Zimmerman*, would

[35] See *Report of the California State Bar Committee on Personal Injury Claims*, 40 CAL. ST. B. J. 148 (1965). See also the conflicting views of Arthur Goodhart and Jacob Fuchsberg, *Trial* magazine, p. 25 (Oct./Nov. 1965).

[36] 35 F.R.D. 9 (W.D. Mich. 1964).

[37] 177 F. Supp. 269 (W.D. Pa. 1959).

seem to produce the most equitable result,[38] and is therefore suggested as the model for a new Arizona rule.

Under such a rule the defendant would be allowed to determine whether he will use mixed evidence for impeachment. If the plaintiff serves an interrogatory requesting information on the fact of and content of surveillance, and the defendant intends to use the evidence to impeach, he would object to the interrogatory. He would then have to submit any such evidence acquired to the court for its determination of whether the evidence could be used for impeachment. If it could, neither the fact of investigation or surveillance, nor the product resulting therefrom would have to be disclosed to the plaintiff.[39] Even if the defendant had no evidence his objection should be sustained to preclude plaintiff from knowing that fact.

Though the plaintiff could not discover the evidence, the defendant could use it only for impeachment. The rule forces all plaintiffs to tell the truth to avoid being exposed and impeached. It cannot harm the truthful plaintiff. "An honest witness cannot be discredited and a dishonest one ought to be."[40] And what is lost by the protection of the evidence? It is said that the plaintiff can, without disclosure, be surprised. But the surprise intended to be avoided under the rules of discovery is of facts unknown to the litigant, not the surprise which he may experience upon being confronted by the adverse party with facts which he thought were solely within his own knowledge.[41]

If obtaining the truth is the ultimate goal of the discovery rules, it would seem that it could best be served by a rule calculated to produce the truth, rather than one which, under the guise of requiring "complete disclosure" allows a dishonest plaintiff to conceal facts of which he knows the defendant is unaware. As long as we operate under the adversary system and some plaintiffs cannot be trusted, it is foolish to require "unilateral disarmament," for it is essential that the defendant have some weapon which will prevent the plaintiff from overstating his

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[38] Frank, *Pre-Trial Conference and Discovery — Disclosure or Surprise*, Arizona Weekly Gazette, Aug. 10, 1965, § A., p. 8.

[39] This procedure would differ from that suggested by Justice Struckmeyer, dissenting in *Zimmerman*. 402 P.2d 212, 220. He would require disclosure under Rule 33 of whether any investigation was made, but would insist that good cause be shown to require production of the evidence under Rule 34. His view, leaving the matter to the discretion of the trial judge, is similar to that followed in California. This view has the disadvantages of both the majority and minority rules and the advantages of neither. If the plaintiff knows that the defendant has not undertaken surveillance, he has a relatively free hand in stating his injuries. If he knows that there has been surveillance, he can "cover" all of the potential situations which he knows the evidence might portray. Hence, knowing that the evidence does or does not exist is almost as valuable as knowing exactly what the evidence is.

[40] Zimmerman v. Superior Court, 402 P.2d 212, 219-20 (1965) (Struckmeyer, V.C.J. dissenting).

[41] See McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D. N.Y. 1939).

case. It is only with such a "balance of power" that the truth is assured of being presented in full. "Maximum discovery" does not, contrary to what the name implies, achieve maximum disclosure of truth, but rather, can be used as a tool to "discover" the opposition's strategy as a means of avoiding the necessity of presenting the complete truth.

Because *Zimemrman* appears to stand for the propositions that all substantive and mixed evidence must be disclosed regardless of its purpose, and that knowledge of the defendant's strategy rather than relevant facts is the legitimate purpose of discovery, it is clear that the Arizona rule must be redefined more along the lines of the federal cases' definition of discovery. Clarification and alteration of the rule could be effected by legislation,[42] court amendment,[43] or judicial decision.[44]

Since the legislature adopted the Rules of Civil Procedure, it can surely amend them. Though the court can also promulgate procedural rules, that power is obviously restricted by the limitations of the rules set by the legislature, so that the court would have to abide by an amendment to Rule 26(b), for example. Such an amendment might state that "relevant matters" subject to discovery are those which relate to the issues, facts, and law of the case, but that the fact of whether or not an attorney possesses information about the opponent, of which the opponent is aware, is not relevant to the opponent's case, and therefore is not discoverable. The amendment could be in the form of a privilege,[45] protecting the strategy of the attorney's case except as to facts of which the opposition is unaware — not the fact that the opposition engaged in various activities (which would obviously be known to him) and not the fact of the attorney's possession of such information.

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[42] Having adopted the Rules of Civil Procedure, the legislature surely has the power to amend them, and the court must work within the framework of the rules as amended. State of Arizona v. Superior Court, 60 Ariz. 69, 131 P.2d 983 (1942).

[43] See ARIZ. REV. STAT. ANN. § 12-111 (1956).

> Statutes as rules of court.
> All statutes relating to pleading, practice and procedure shall be deemed rules of court and shall remain in effect as such until modified or suspended by rules promulgated by the Supreme Court.

[44] If the court did adopt the minority discovery rule outright there is little hope that change or clarification would come about in this way. It could be achieved, however, by not distinguishing between impeachment evidence and mixed evidence used soley to impeach, and by distinguishing between relevant facts bearing on substantive issues and the irrelevant fact that the defendant does or does not possess knowledge about the plaintiff. See discussion in text, *supra* at 290.

[45] In this respect, the policy expressed in the California equivalent to Rule 26(b) is interesting. After exempting an attorney's work product from discovery unless denial of discovery would unfairly prejudice a party, the rule states: "(g) Policy. It is the policy of this State (i) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry and efforts." CAL. CIV. CODE § 2016. For construction of this section see California cases cited note 5 *supra*.

Another alternative could be an amendment to the pre-trial conference rules, in effect adopting the procedure used in most federal courts. The rule would simply provide that if a party desired to use evidence to impeach, he must submit it to the court for a determination of whether such evidence is impeachment evidence and then avow that it will not be used to prove any substantive issue. The evidence would then be immune from discovery.

With regard to court action on the rule, the court could either amend the Uniform Rules of Practice or establish a firm rule by judicial decision. When the court has departed from an accepted general rule, it must expect sometimes to have to abandon its experiment in favor of experience. As a means of clarifying Arizona's rule on pre-trial discovery of impeachment evidence, our court should welcome the opportunity to redefine its position.

Until the rule is changed, it seems clear that the best technique of the defense attorney would be to depose the opposition early in the case to get a statement of injuries, and delay any surveillance until after the pre-trial conference. Unless the plaintiff served a new set of interrogatories just prior to trial, delaying surveillance until after the plaintiff served his first interrogatories would preclude the defendant from having to disclose what he had found out about the plaintiff. Though the time for investigation is thereby drastically limited, there is still the possibility that an over-confident, careless, and dishonest plaintiff can be observed doing that which, in an earlier deposition or later at the trial, he asserted he could not do.

Pervading many recent decisions, though not usually overtly expressed, is the desire to aid the plaintiff, at the defendant's expense, in every way possible. The philosophy that an injured person must be compensated regardless of whose fault caused the injury has become the battle cry of the plaintiff. It is ironic that at a time when our courts are so greatly concerned with protecting the rights of the criminal defendant, these same courts show almost no concern for the rights of the civil defendant. One of the rights of either party is the right to attempt to impeach the opposition witnesses. If impeachment is not to become a hollow sham, a rule must be formulated which will put the parties back into balance and will preserve impeachment as a means of assuring that the whole truth will be presented. It is paradoxical but true that to achieve the greatest actual discovery, "discovery" must sometimes be limited. Arizona should redefine its pre-trial discovery rule, creating an immunity for impeachment evidence to achieve this goal.